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No. 95-2091

In the

Supreme Court of the United States

October Term, 1995

J.D. SHARP, SCOTT CANNON and MARSHALL McDONALD, in their individual capacities,

Petitioners,

vs.

SUZANNE MYERS, individually and as administratrix of THOMAS MYERS, decedent, et al.,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents respectfully pray that this Court will deny the petition for writ of certiorari filed by petitioners. The Petitioners seek review of the "propriety of the judgment of" the Tenth Circuit, filed on May 10, 1996. The Petitioners sought appellate review of an

Order entered by the United States District Court for the Western District of Oklahoma denying qualified immunity to petitioners. The Tenth Circuit held that no jurisdiction for such appeal existed, and the petitioners appeal therefrom.

I. STATEMENT OF THE CASE

Respondents, decedent Tom Myers his wife/widow Suzanne Myers and their infant son Samson, submit the following material to correct or supplement allegations by the Petitioners.

While Tom was only three years old he witnessed the brutal shooting death of his mother by his father. He then watched as his father committed suicide. After the deaths Tom was adopted by his father's sister. To ease his pain from these events Tom had been told that he had been adopted by the Myers' while Mr. Myers was stationed with the military in Europe. For almost 30 years Tom lived with this story.

During the early days of April, 1993, Tom received information from another relative that in fact he was not adopted and that it was his natural father and mother who died in the murder/suicide. Tom, who lived 500 miles from his adoptive mother (a sister of his father), confronted her with this allegation. She promised to come to Oklahoma City to discuss the matter, and did in fact arrive on April 3, 1993.

On the night of April 3, 1993, Tom Myers and his adoptive mother discussed the murder/suicide and Tom's family history. After this conversation Tom Myers began drinking. He did not, however, drink in front of his adoptive mother. Later, after his mother had gone to bed, Tom and Suzanne Myers discussed the revelations and Tom's family history. The couple argued, and after midnight Tom demanded that his wife, infant son, and adoptive mother leave the family home. Suzanne Myers took the child and Tom's mother to her parents house a few miles away.

More than ten hours later, Suzanne Myers returned, with her father and Tom's adoptive mother, to the apartment to check on Tom. Tom Myers was still drunk and refused to allow his wife or family into the apartment. Suzanne Myers, having been through an intensive rehabilitation program with Tom, knew that she could summon the police in hopes of getting help for her depressed and intoxicated husband.

Officers from the Bethany, Oklahoma police department arrived a short time later and began talking with Tom Myers. Tom refused to allow them to enter the apartment, but did communicate with them. The police officers from Bethany did not request outside assistance.

An off duty sheriff's department detention supervisor was monitoring police calls at home and heard the call given to the Bethany police officers. Though off duty, and not requested to

assist, the supervisor came to the scene and took over talks with Tom Myers. Eventually the Oklahoma County Sheriff's Department's tactical/SWAT team was summoned. Additionally, the sheriff, defendant J.D. Sharp, arrived on the scene and took command.

The tactical team members, on authority of defendant J.D. Sharp, kicked in the door to the Myers' apartment. The plan, as testified to by other members of the tactical team, was to kick open the door and look inside without entering the apartment. Instead, petitioners Cannon and McDonald immediately rushed into the apartment with their drawn weapons.

At least fifteen shots were fired by the petitioners at the supine body of Tom Myers. Tom was struck 9 times in the upper body, neck and face. At least seven of the nine shots took a path through Tom's body that in a downward trajectory. One bullet entered Tom Myers' right cheek, exited under the left jaw, and then entered the body cavity through the left shoulder. Another bullet struck Tom Myers in the right upper chest just below the collar bone and came to rest in the left back at the belt line. Other bullets traveled in similar trajectories.

After being shot nine times, Tom Myers died while still on the couch of his home.

Petitioners have incorrectly alleged that after "a standoff of several hours" decedent, Tom Myers, fired one shot "at a deputy." Petition at page 2. There has been no finding by any trier of fact that

such was the case. This allegation, along with many other factual matters, is at issue. The closest we come to a factual finding on this issue is that by the trial court which states, "Tom Meyers (sic) fired a shot." There is no finding that this shot was "at a deputy."

Additionally, the shot was not fired after "a standoff of several hours." The police had been on the scene less than one hour when the gun accidentally discharged in the apartment. According to police officers who witnessed the event, Tom Myers immediately announced that the shot had been accidental and that it had struck a wall at a point farthest from any police personnel. None of the officers on the scene took any retaliatory action, and made no move to leave the positions they held prior to the accidental discharge.

Petitioners have couched their version of the facts in such a way that one could believe that the accidental firing of a shot and the attempt to take Tom Myers into "protective custody" were close in time. They were not. The accidental shot occurred before 2:30 p.m., and the attack of Tom Myers happened after 8:00 p.m. Almost six hours elapsed between the two events. It should also be noted that defendant J.D. Sharp, during depositions, admitted that Tom Myers had taken no action prior to the attack against his apartment which would warrant his arrest or the use of deadly force against him.

Petitioners allege that "as the deputies were in the process of executing the warrant, Decedent met them with a raised rifle." Id. Again, Respondent disagrees with this version of the facts. This is

another factual allegation which remains at issue. Respondents intend to show at trial, through the physical evidence, that Tom Myers was lying on the couch at the time he was shot by the petitioners.

Respondents also submit that the "warrant" in question was not in fact a warrant but was an "Order of Detention" which was to be used to take decedent into "protective custody" for substance abuse treatment. As defendant J.D. Sharp testified to during deposition, Tom Myers had taken no action which would require the issuance of a warrant for his arrest.

Likewise, the "warrant" was improperly issued since it violated both Oklahoma law and constitutional standards preventing an unreasonable seizure of the person. The facts surrounding the issuance of the "warrant" are still at issue, and Respondents submit that there are genuine issues of fact remaining.

It should also be noted that Petitioners have slipped in an irrelevant piece of information which has no bearing on this Petition. Petitioners attempt to sway this Court's opinion by alleging that both the Oklahoma County District Attorney and a shooting review board of the defendant county reviewed the matters surrounding the killing of Tom Myers. The Respondents forcefully state that such actions have no legal weight and are certainly not persuasive. Likewise, the acts of the persons charged with the duty of protecting the county's pocket book are wholly irrelevant. The only issue before this Court

is whether the Petitioners should be given a third opportunity to delay the inevitable trial in this matter.

II. STATEMENT OF THE ISSUE

THE HOLDING IN BEHRENS V. PELLETIER DOES NOT APPLY IN THIS CASE AND DOES NOT GRANT AN ABSOLUTE RIGHT OF REVIEW BEYOND THAT ALREADY EXERCISED BY THE PETITIONERS

The Respondents herein (Plaintiffs below) brought an action against the Petitioners in February 1994 for constitutional and statutory violations arising from the incidents described above. The Trial Court entered a Scheduling Order shortly thereafter. This Order set a deadline for completing discovery and filing all dispositive motions.

Both parties conducted extensive discovery. All written discovery was completed before the deadline. All depositions by Respondent had been completed, and the Petitioners had completed all but one deposition within the time allotted. By agreement of the parties, and upon joint motion, the deadline for this deposition was extended to allow Petitioners to depose the remaining witness.

No dispositive motions were filed until just before the deadline. By this time, the parties had completed discovery and survived the substantial rigors of pre-trial procedure.

In their sole motion the Petitioners sought the protections of

qualified immunity. The Trial Court carefully weighed the issues raised by the Petitioners in their motion and found that a genuine issue did exist on the issues of excessive force. The petitioners, on the day Voir Dire was to begin, gave notice of their intent to appeal, and the trial was postponed to allow Petitioners the opportunity to seek interlocutory review at the Tenth Circuit.

The petitioners submitted to the United States Court of Appeals for the Tenth Circuit their claims that immunity was denied improperly. Respondents responded in a timely fashion. The Tenth Circuit, in applying the holding by this Court in Johnson v. Jones, 515 U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), found that they (Tenth Circuit) did not have jurisdiction to hear an appeal on the issue of qualified immunity where the pivotal issues are those based in fact rather than law.

The Petitioners now allege that this Court's decision in Behrens v. Pelletier, ___ U.S. ___, 116 S.Ct. 834 (1996), grants them a superior right of review above that set forth in Johnson v. Jones, 515 U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). The Respondents disagree and respectfully request that this Court deny the Petition for a Writ of Certiorari.

III. GROUNDS FOR DENYING THE WRIT

A DENIAL OF QUALIFIED IMMUNITY BASED ON ISSUES OF FACT IS NOT APPEALABLE ON AN INTERLOCUTORY BASIS AND BEHRENS V. PELLETIER DOES NOT CREATE SUCH RIGHT

The Petitioners claim that Behrens requires mandatory appellate jurisdiction where qualified immunity is the issue. The Respondents disagree and contend that Behrens does not alter Johnson but instead clarifies a procedural defect for determining what type of issues are reviewable. This change does not affect the Tenth Circuits decision and should not cause further delay in getting this case back to trial.

Prior to 1995 the courts had followed a standard of allowing interlocutory appellate review of immunity issues as set forth in Mitchell v. Forsyth, 472 U.S. 511 (1985). By allowing such review the courts protected the central theme of qualified immunity; i.e., to prevent unneeded trials and to allow government officials the freedom to act without the fear for continued judicial scrutiny or civil liability. By 1995, though, this attitude toward interlocutory appeals on immunity claims had changed.

In June of 1995 the United States Supreme Court handed down the pivotal case of Johnson v. Jones, 515 U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). This case held that only claims of

immunity based on questions of law were immediately appealable. Those matters which were entrenched in a question of fact could not be appealed as a final order. Specifically, this Court held that:

> [A] defendant, entitled to invoke a qualified immunity defense, **may not** appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of fact for trial.

Johnson at 2159 (emphasis added).

The holding in Johnson effectively placed a limit on the nature of an appeal at the interlocutory stage. By limiting the appeal to questions of law this Court strengthened the trial courts' ability to weigh issues of fact without the expectation of piecemeal litigation through interlocutory appeals. By limiting the appealability of these issues this Court has left in place the long standing rule that summary judgment will be denied when a "genuine issue" as to the facts exists. See, Rule 56 of the Federal Rules of Civil Procedure.

In the present case the finding by the trial court that issues of fact remain demand that summary judgment be denied. Likewise, an appeal can not be taken where the issues surround questions of fact and not those focused on law. Since the Order in question determined only whether a factual issue existed the petitioners have no right of immediate appeal.

In applying Johnson the Tenth Circuit properly applied the

new standard for interlocutory appeals of qualified immunity claims. Though the petitioners did argue, during oral argument, that Behrens applied, the Tenth Circuit correctly followed Johnson.

When one examines Behrens it is clear that it does not change Johnson's position on what type of matters are appealable. Even under Behrens a government defendant can not appeal a denial of qualified immunity when the issue is one of fact rather than law. What Behrens does provide, though, is the ability to appeal each of several separate claims of immunity apart from the others.

In Behrens a government employee and defendant sought the protections of qualified immunity at the earliest stages of trial by filing a Motion for Dismissal. This was denied and defendant appealed. Pelletier v. Federal Home Loan Bank of San Francisco, No. CV 89-969 (CD Cal., Oct. 5, 1989).

At a later stage of the case the defendant attempted his immunity defense through summary judgment, and was again denied. He attempted a second appeal. This time, though, it was based on the summary judgment denial rather than the denial of the Motion to Dismiss. Pelletier v. Federal Home Loan Bank of San Francisco, No. CV 89-969 (CD Cal., Oct. 5, 1989).

The Court of Appeals for the Ninth Circuit entertained the appeal not withstanding its interlocutory nature. The Court rejected

the defendant's claim on it merits, though, and *in dictum* held:

> [T]hat a defendant claiming qualified immunity could not take advantage of the several opportunities for immediate appeal afforded him by bringing repeated pretrial appeals, and that one such interlocutory appeal is all that a government official is entitled to and all that the Circuit Court would entertain.

Pelletier v. Federal Home Loan Bank of San Francisco, 968 F.2d 865, 870 (9th Circuit 1992).

The matter was sent back to the trial court where discovery was conducted. Following discovery defendant moved for summary judgment on qualified immunity grounds. Defendant contended that his actions had not violated any "clearly established" right of Plaintiff. The trial court denied the motion and held that "material issues of fact remain." Pelletier v. Federal Home Loan Bank of San Francisco, No. CV 89-0969 (CD Cal., Sept. 6, 1994).

Defendant filed a notice of appeal. The trial court, on Plaintiff's motion, certified the appeal as frivolous. In an unpublished order, the Ninth Circuit dismissed the appeal for lack of jurisdiction. Pelletier v. Federal Home Loan Bank of San Francisco, No. 94-56507 (9th Circuit, Nov. 17, 1994); Certiorari granted 514 U.S. ____ (1995).

The Ninth Circuit, in applying their "one appeal" rule, refused to hear the appeal on the denial of immunity through summary judgment. The defendant sought a Writ of Certiorari, and

this Court pronounced the ability of a government defendant to appeal each claim of immunity separately when the claims arise under differing conditions.

This Court was careful to note that a claim of immunity may arise at an early stage of a trial through a Motion to Dismiss and then again after discovery is underway through a Motion for Summary Judgment. As this Court noted it is likely that a Motion to Dismiss filed early in a case will be based on questions of law while a later Motion for Summary Judgment will be based on facts uncovered during discovery. As such, two standards might apply in measuring the question of immunity and thus present two distinct issues for appeal.

In short, Behrens does not grant a never ending right of appeal to a government defendant. It does grant such defendant a right to appeal separate issues of immunity. However, for the defendant to have such right of appeal he/she must still fall within the standards set forth in Johnson.

In the present case the Petitioners sole claim for immunity was based exclusively on questions of fact raised through a single Motion for Summary Judgment. The Petitioners **did not** claim that any law was unclear or in question. The only question before the trial court was whether the petitioners used excessive force, and the

trial court found that substantial issues of fact surrounding that question existed. As such, the petitioners sought a review on that issue, and the Tenth Circuit applied the proper standard.

To overcome the standard of Johnson a petitioner must show that the law in question is unclear or not well founded in prior holdings. This was not done and Johnson precludes an interlocutory appeal of the fact based question.

In evaluating this standard one can go a step further in this case to see why Johnson must be applied. Immunity was granted to the defendant county in this action where Respondent's (Plaintiffs below) claims hinged on issues of policy and training. The Trial Court sustained a bid for immunity by the county on these issues. The Respondents are prepared to show that the petitioners policies on use of force were out of date and did not comply with then current standards. But, an appeal on these issues can not be taken until after a "final judgment" is entered.

Prior to Johnson a government defendant had a virtually unlimited right of interlocutory appeal so long as part of the claim was based on a denial of immunity. Even where the denial was based on a finding by the trial court that facts remain at issue the government defendant had a right of appeal. Plaintiffs, on the other hand, did not have the luxury of such right.

In the present case this meant that the Petitioners could

appeal a denial of immunity based on questions of fact but similar questions of fact raised by Respondents could not be appealed. With the decision in Johnson, though, the playing field has been tilted a bit back toward level; even though the government defendant still retains a right of appeal that a citizen plaintiff would not have.

The Petitioners now urge this Court to delay trial again by requiring appellate review based on the holding in Behrens. Specifically, the petitioners claim that Behrens allows a "second" appeal on issues of immunity. The petitioners go so far as to suggest that Behrens grants a mandatory right of appeal which clearly contradicts the holding in Johnson. See, Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, at page 6-7.

The Petitioners interpretation of Behrens is simply wrong. It is clear that Behrens grants no more right than that already allowed under Johnson. In fact, Behrens does nothing more than correct a faulty appellate rule which would preclude a defendant from raising (and appealing) the immunity defense at more than one stage of a case.

The petitioners in the present action refuse to accept that Johnson limits their ability to appeal the trial court's order denying summary judgment. Though their claim is based wholly on issues of

fact, Petitioners contend that Johnson does not apply and that the Tenth Circuit is wrong in not reviewing the decision of the trial court. Petitioners incorrectly rely on Behrens to support their argument.

When one reads Behrens it is clear that Johnson does apply. Justice Scalia, writing for the majority, states it best when he wrote:

> Johnson held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly separable from the Respondents claim, and hence there is no final decision under Cohen and Mitchell.

Behrens at 840-42, citing Cohen v. Beneficial Indust. Loan Corp., 337 U.S. 541 (1949) and Mitchell v. Forsyth, 472 U.S. 511 (1985)(emphasis added).

In the present case the entire thrust of petitioners original motion was to attack the sufficiency of the facts. The trial court found that factual evidence did exist which could support a finding that particular conduct occurred.

IV. CONCLUSION

Frankly stated the petitioners have missed the boat in their interpretation of Behrens and how it applies to this case. As such, they must be denied the relief sought and this case must proceed to trial at the earliest possible date. The petitioners rights of appeal

have been protected and it is time to protect the rights of Tom Myers, Suzanne Myers, and Samson Myers to have a jury determine whether these Petitioners used excessive force.

Respondents respectfully pray that this Court will deny the Petition for a Writ of Certiorari, and enter an Order sending this matter immediately back to the trial court for a trial on the merits.

Respectfully Submitted:

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